THE SUPREME COURT OF THE

FEDERATED STATES OF MICRONESIA

TRIAL DIVISION-STATE OF PONAPE

VENANCIO SULDAN, Plaintiff, vs. FEDERATED STATES OF MICRONESIA, Defendant,	)	CIVIL ACTION NO. 1982-029

OPINION
Before the Honorable Edward C. King
Chief Justice
October 28, 1983
Ponape, Caroline Islands 96941

APPEARANCES:

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This is the first case in which this Court has been required to determine whether a legislative provision passed by Congress may be contrary to the Constitution, and therefore void. The challenge is raised by Venancio Suldan, a former national government police officer. The provision questioned is part of the National Public Service System Act relating to dismissal of government employees for disciplinary reasons.

Specifically, Mr. Suldan contends that the last two sentences of 52 FSM Code § 156[1] are unconstitutional because those sentences permit a management official to make the final determination on a question of dismissal without reviewing, and perhaps even without receiving, the evidence introduced at the termination hearing prescribed in the Act. An additional constitutional claim is that the language of 52 FSM Code § 156 permits a biased official to make the final decision.

Procedural Background

This case is before the Court for the second time. During the first proceeding, the same constitutional arguments were raised. Since no decision had yet been made by the highest management official, this Court held that consideration of the constitutional issues would be premature. The case was remanded to President Nakayama for his

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[1] §156. Recommendations. The committee shall prepare a full written statement of its findings of fact and its recommendations for action within seven calendar days after the close of the hearing. Its recommendations may include modification or reversal of the disciplinary action, from which appeal was taken. It shall forthwith transmit that statement, with such supporting documentation as it deems appropriate, to the highest management official responsible for the agency in which the appellant is or was employed. The decision of that management official shall be final. (emphasis added)

decision. Suldan v. FSM, 1 FSM Intrm. 201 (Pon. 1982).

On November 5, 1982, President Nakayama, after "complete and careful review" of the record, ruled that Mr. Suldan had on several occasions failed to carry out his police duties properly and that those failures constituted sufficient grounds for termination.[2] He concluded that the good of the public service would be served by dismissal.

President Nakayama specifically disagreed with a legal interpretation of the ad hoc committee which had presided over Mr. Suldan's termination hearing. See 52 FSM Code §§ 153-155. That committee, noting Mr. Suldan's personnel files reflected sick leave and annual leave credit for absences relied upon by the government as grounds for termination, had concluded that the absences had in effect been forgiven. The committee reasoned that although Mr. Suldan's unexplained absences did constitute sufficient cause for his termination, the government had waived its right to rely upon those absences as grounds for dismissal.

President Nakayama concluded that the granting of annual and sick leave to Mr. Suldan had no such effect. He therefore denied Mr. Suldan's request for reinstatement.

Appealing to this Court, Mr. Suldan admits that his acts and omissions could have justified his termination. He does not deny that

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[2]The decision of the ad hoc committee, November 3, 1981, states as established facts that Mr. Suldan failed to report to work on four occasions, three of those times without properly notifying his superiors. On one of the occasions a fight occurred in the presence of a high governmental official whom Mr. Suldan was supposed to protect. The ad hoc committee also found that on a fifth occasion Mr. Suldan deserted his post and used a government vehicle for an unauthorized purpose.

President Nakayama carefully reviewed the record of the termination hearing. Instead, he relies on the claim that the statute is unconstitutional on its face in that it would permit a decision by the "highest management official" either without full review of the hearing record or based upon information outside of the record.

His claim concerning impartiality differs only slightly. In addition to arguing that the statute unconstitutionally fails to require that the decision maker be impartial, he also contends that President Nakayama may have been unfairly biased against him and that the President's decision therefore was unfair.

I. JUDICIAL REVIEW OF LEGISLATION

Mr. Suldan asks that this Court declare part of one section, 52 FSM Code § 156, of the National Public Service System Act unconstitutional. It has not previously been determined whether the Court has authority to declare an act of Congress unconstitutional. Therefore, before going to the merits of Mr. Suldan's attack on the statutory language it is necessary first to determine whether this Court has the powers of judicial review which Mr. Suldan assumes.

Analysis of constitutional grants of power of course must start with the constitutional language itself. Alaphonso v. FSM, 1 FSM Intrm. 209, 214 (App. 1982); FSM v. Tipen, 1 FSM Intrm. 79, 82 (Pon. 1982). The Constitution of the Federated States of Micronesia contains no direct statement about judicial review, yet various provisions bear upon the question and provide guidance.

The Constitution's Supremacy Clause declares unequivocally that attempted governmental action in conflict with the Constitution is

invalid. "This Constitution is the expression of the sovereignty of the people and is the supreme law of the Federated States of Micronesia. An act of the Government in conflict with this Constitution is invalid to the extent of conflict." FSM Const. art. II, § 1.

Obligations are imposed by the Constitution upon the national and state governments.[3] Public officials must take an oath to uphold and support the Constitution.[4] Thus, the Constitution allocates powers between state and national governments and among the executive, legislative and judicial branches of the national government but exercise of those powers must be in accordance with the Constitution itself.

Although all public officials are duty bound to avoid unconstitutional action, the Constitution unmistakably places upon the judicial branch ultimate responsibility for interpretation of the Constitution. The judicial power of the national government is vested in the Supreme Court, art. XI, § 1, and this Court is given original and appellate jurisdiction over cases arising under or requiring interpretation of the Constitution. Id. art. XI, §§ 6(b), 7. Certification to this Court's appellate division is required of state or local courts in cases involving substantial questions requiring interpretation of the Constitution. Id. art. XI, § 8. Finally, the

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[3] "It is the solemn obligation of the national and state governments to uphold the provisions of this Constitution and to advance the principles of unity upon which this Constitution is founded." FSM Const. art. XIII, § 3.

[4] "On assuming office, all public officials shall take an oath to uphold, promote, and support the laws and the Constitution as prescribed by statute." FSM Const. art. XIII, § 7.

Constitution establishes this as "the highest court in the nation," and requires that our decisions be consistent with the Constitution. Id. art. XI, §§ 2, 11.

These Constitutional provisions leave no doubt that all persons purporting to exercise governmental powers available through governments established under this Constitution are bound to act in accordance with the provisions of the Constitution. Officials, whether they be in the legislative, executive, or judicial branch, may not rely upon the Constitution for their powers while simultaneously disregarding the limits of those powers as provided in the Constitution.

While all public officials are sworn to uphold the Constitution, the Constitution places upon the courts the ultimate responsibility for interpreting the Constitution. We are forsworn by the Supremacy Clause from enforcing national laws or treaties contrary to the Constitution itself. In a case such as this, where a party before the Court insists that a particular national law contains provisions contrary to the Constitution, we are required by the Constitution to consider that assertion. If we determine that the statutory provision is indeed repugnant to the Constitution, we may not enforce the statutory provision nor permit its enforcement by others. Such a statute, in the words of the Supremacy Clause, would be "invalid to the extent of the conflict."

While the words of the Constitution independently establish this Court's responsibility to review statutes enacted by Congress and other actions of officials governed by the Constitution and to refrain from enforcing or supporting any law or action which we find to be violative of the Constitution, it may be worthwhile to verify that other sources

or modes of analysis lead to the same conclusion.

This Court has noted previously that comparison of this Constitution to that of the United States, as well as review of the journals of the Micronesian Constitutional Convention, reveal that this Constitution is based in great part upon the Constitution of the United States. See Lonno v. Trust Territory, 1 FSM Intrm. 53, 69 (Kos. 1982). These similarities of approach mandate that this Court, in attempting to determine its role under this Constitution, will give serious consideration to United States constitutional analysis at the time of the Micronesian Constitutional Convention. Tosie v. Tosie, 1 FSM Intrm. 149, 153-54 (Kos. 1982).

The two Constitutions reflect substantial similarity of approach concerning judicial review. Neither contains the words "judicial review." Yet both provide for separation of powers among executive, legislative, and judicial branches, and the division of powers among the national and state governments. The judiciary provisions in the two Constitutions are similar[5] and both Constitutions contain Supremacy Clauses.[6] See In re Jonas, 1 FSM Intrm. 322, 327 (App. 1983).

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[5]Compare art. XI of the Federated States of Micronesia Constitution with art. III of the United States Constitution. See also the comparison set forth in In re Nahnsen, 1 FSM Intrm. 97, 102 (1982).

[6]The FSM Constitution provides a considerably stronger statement of constitutional supremacy, naming only the Constitution as "supreme law." The United States Constitution, art. VI, cl. 2, identifies "Laws of the United States" and "Treaties made...under the Authority of the United States" as also being the "supreme Law of the Land." It was a court decision which determined that the United States Constitution was paramount over other United States laws. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). Thus the FSM Constitution, with its direct mandate of constitutional supremacy over other national law, is, even more strongly suggestive of judicial review.

Turning to the American constitutional law on the subject of judicial review, we immediately confront one of the most famous and renowned of all United States court decisions, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). The United States Supreme Court there held that the Constitution required the judiciary to refrain from enforcing laws enacted by the United States Congress contrary to the Constitution.

The decision is now among the most frequently quoted of all judicial analyses and is generally regarded as a powerful and persuasive statement of the need for judicial review. The case merits some extended discussion here.

Marbury and others asked the United States Supreme Court to issue a writ of mandamus to require Secretary of State James Madison to deliver judicial commissions signed by outgoing President John Adams but still undelivered when President Adams' term of office expired. The new president, Thomas Jefferson, had ordered Secretary of State Madison not to deliver the judicial commissions.

The question was whether the Court had power to issue the writ of mandamus asked for by the petitioners. The petitioners relied upon the Judiciary Act of 1789 which Chief Justice Marshall interpreted as indeed attempting to give the United States Supreme Court original jurisdiction to issue writs of mandamus. He saw the grant of power as inconsistent with the Constitution which gave the Supreme Court original jurisdiction only in limited kinds of cases.

Faced with an apparent conflict between the law enacted by the United States Congress and the Constitution itself, Chief Justice Marshall found it necessary to determine whether the Court nevertheless

should uphold and enforce the law enacted by Congress. He began his analysis by considering the nature of constitutions in general. "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." Marbury v. Madison, 5 U.S. (1 Cranch) at 177, 2 L.Ed. at 73. Marshall saw this "fundamental principle" as one "essentially attached to a written constitution". He then noted that it is "emphatically the province and duty" of the judiciary to "say what the law is."

> Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
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> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id. at 177-78.

The principles led inexorably to his conclusion: "If, then the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution and not such ordinary act, must govern the case to which they both apply" Chief Justice Marshall felt that a contrary conclusion would "subvert the very foundation of all written constitutions." Id. at 178.

More than 175 years have elapsed but Marbury v. Madison remains binding law in the United States today. The decision has stood the test

of time both pragmatically, in that it has worked effectively in the United States, and as a persuasive and unrefuted analysis.[7]

These considerations alone would be compelling reasons for this Court to follow the Marbury approach even if our options were unrestricted. However the Court by no means has unfettered freedom in interpreting the Constitution. If the words of the Constitution are ambiguous or doubtful, it is our duty to seek out the intention of the framers. FSM v. Tipen, 1 FSM Intrm. 79, 83 (Pon. 1982). The Constitution was drafted against the background of the United States Constitution, and the pattern of provisions in the Federated States of Micronesia Constitution touching upon the notion of judicial review is similar to the United States Constitution's provision. By 1975, when the Micronesian Constitutional Convention was being held, judicial review was at the very heart of the American constitutional system. By using the United States Constitution as a blueprint, the drafters created a presumption that they were adopting such a fundamental American constitutional principle as judicial review, found to be inherent in the language and very idea of the United States Constitution. There is no indication in the constitutional history of a desire to reject judicial review. The Constitutional Convention's

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[7]One commentator, in noting that Chief Justice Marshall's analysis is not entirely conclusive, nevertheless recognizes that "[n]o one has formulated a stronger textual argument for the proposition that congressional interpretation is final, or for any other alternative." L. Tribe, American Constitutional Law 22 (1978). See also J. Nowak, R. Rotunda, & J. Young, Constitutional Law 10 (1978) ("Although Marshall's decision can be divided and attacked, it stands as an impressive argument when taken as a whole. The Chief Justice, in this case, is only asserting that the Constitution is a superior form of law established by the direct will of society in which the Judges must follow in the course of deciding issues before them.")

acceptance of the pertinent provisions of the United States Constitution's provisions, coupled with silence on the question of judicial review, amounts to a powerful statement of the assumption of judicial review.

I note that in assuming the concept of judicial review of legislative action, the framers of the Constitution did not work a radical change from previous legal practice in Micronesia under the Trust Territory Government.[8] Nor does acceptance of the concept set the Federated States of Micronesia on a distinctly American path which may seem strange or alien to other nations throughout the world. Although the concept of judicial review had essentially American origins[9] and is often seen as a product of the common law,[10] many countries whose legal systems are traceable to civil law or other legal traditions now also

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[8] Even without a constitution to enforce, the Trust Territory High Court set various statutes aside on grounds that they violated rights of due process or equal protection. See, e.g., Trust Territory v. Bermudes, 7 TTR 80 (Mrns. 1974); Trust Territory v. Tarkong, 5 TTR 252 (Yap 1970); Yang v. Yang, 5 TTR 427 (Pon. 1971).

[9] In addition to Marbury v. Madison, supra, see A. Hamilton, The Federalist No. 78, at 466 (A. Hamilton) (C. Rossiter ed. 1961). ("By a limited Constitution, I understand one which contains certain specified exception to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.")

[10] The 1610 statement of Lord Coke, a famous English jurist, is often pointed to as the original articulation of the concept of judicial review: "When an Act of Parliament is against common right and reason...the common law will control it and adjudge such act to be void." R. Berger, Congress v. The Supreme Court 23 (1969), quoting from Bonham's Case, 8 Coke 114a, 118a, 77 Eng. Rept. 647, 652 (1610).

adhere to the principle of judicial review.[11]

A brief summary. The constitutional language demonstrates that judicial review is necessary to implement the scheme of the Constitution. This Constitution is based upon the United States Constitution, which in turn has at its very foundation the idea of judicial review. Finally, the concept of judicial review is not unique to those nations who trace their jurisprudence to the American system or to the common law. Rather the concept is familiar throughout the world and is widely thought to be inherent in a constitutional system. For all of these reasons I conclude that this Court has the constitutional power and obligation to review legislative enactments of Congress and to set aside any national statutes to the extent they violate the Constitution.

II. CONSTITUTIONAL ANALYSIS

Having determined that the Court has the requisite authority and responsibility to respond to an assertion by a citizen that a statute enacted by Congress is unconstitutional, consideration now must proceed to the standards to be employed in determining whether a statute violates the Constitution.

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[11] "In the European heartland of the civil-law orbit, the most elaborate systems of judicial review are found in Austria, Italy and West Germany.... In the socialist orbit, we encounter judicial review in Yugoslavia." R. Schlesinger, Comparative Law 322 n.103 (1980); See also D. Clark, Judicial Protection of the Constitution In Latin America, 2 Hastings Const. L.Q. 405 (1975) ("Out of a total Latin American population of 286 million, a majority of people live in countries with relatively effective judicial review."); Mezey, Civil Law and Common Law Traditions: Judicial Review and Legislative Supremacy in West Germany and Canada,32 Intl. and Comp. L.Q. 689 (1983); and B. Okere, Fundamental Objectives and Directive Principles of State Policy Under the Nigerian Constitution, id. at 214, 223-28.

Mr. Suldan contends that the last two sentences of 52 FSM Code § 156 violate his constitutional right to continued government employment. The Constitution says nothing directly about a right to continued employment. Mr. Suldan relies on the Due Process Clause in the Constitution's Declaration of Rights.[12] This Court has not previously outlined or determined the extent of constitutional protection available here to a national government employee threatened with termination of his job. The journals of the Micronesian Constitutional Convention are silent on the question. We must therefore look elsewhere for guidance. In Alaphonso v. FSM, 1 FSM Intrm. 209 (App. 1982), our appellate division traced the origins of the Due Process Clause and located the United States Constitution as its source. Decisions of United States courts interpreting the Due Process Clause of the Fifth Amendment of the United States Constitution, especially decisions rendered prior to completion of the Constitutional Convention, were identified as primary sources of guidance for this Court in deducing the meaning of our Due Process Clause. Id. at 216; see also In re Iriarte (I), 1 FSM Intrm. 239, 249 (Pon. 1983).

A. Government Employment as Property

American constitutional law at the time of the Micronesian Constitutional Convention yields the following pertinent principles, which I find to have been adopted in the Federated States of Micronesia Constitution. Government employment that is "property" within the meaning of the Due Process Clause cannot be taken without due process.

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12 "A person may not be deprived of life, liberty, or property without due process of law, or be denied the equal protection of the laws." FSM Const. art. IV, § 3.

To be property protected under the Constitution, the employment right must be supported by more than merely the employee's own personal hope. There must be a claim of entitlement based upon governmental assurance of continual employment or dismissal for only specified reasons. These assurances may come from various sources, such as statute, formal contract, or actions of a supervisory person with authority to establish terms of employment. Only if an employment arrangement meets this property test does the Federated States of Micronesia Constitution require procedural due process as a condition to its termination.[13] See generally J. Nowak, R. Rotunda & J. Young, Constitutional Law 495-96 (1978).

The parties are in apparent agreement that Mr. Suldan's continued employment with the national government is sufficiently protected by statute to constitute property. They plainly are correct. The National Public Service System Act does not permit termination on the whim of a supervisor. An employee may be dismissed only "for disciplinary reasons" and upon the determination of a management official that "the good of the public service will be served thereby." 52 FSM Code § 152.[14]

"[W]ritten notice setting forth the specific reasons for the dismissal" is required, as a condition for dismissal. Id. References to "disciplinary reasons," "written notice of...specific reasons for the

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[13]Since Mr. Suldan's employment interests are held to be "property," there is no necessity for determining whether his "liberty" interests under the Constitution also may be implicated.

[14]The Act's provisions concerning reductions-in-force, 52 FSM Code § 147, and probationary service, 52 FSM Code § 138, are not here applicable.

dismissal," hearing rights and "good of the public service" combine to evoke a congressional requirement that "wrongful conduct" or "cause" be established as a grounds for dismissal under §§ 151 to 157. The Act, then, fixes two conditions for termination of an employee under 52 FSM Code §§ 151-157. Responsible officials must be persuaded that: (1) there is "cause", that is, the employee has acted wrongfully, justifying disciplinary action; and (2) the proposed action will serve the "good of the public service."[15]

Congress has also secured this interest in continued employment with a right to procedural protections. In addition to the written notice requirement, there is a right to a hearing before an ad hoc committee of three members. Id. at §§ 154-155. The recommendation of that committee goes to the "highest management official responsible for the agency in which the appellant is or was employed," for final decision. These statutory provisions create a mutual expectation of continued employment for national government employees and protect that employment right by limiting the permissible grounds, and specifying necessary procedures, for termination.[16] This, in turn, is sufficient

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[15]See 52 FSM Code § 152. See also FSM Pub. Serv. Reg. 18.4: "An adverse action may not be taken against an employee covered by this part except for such cause as will promote the efficiency of the public service."

[16]Petitioner here does not contend that the terms of the Act are so vague as to leave the decision makers without adequate standards to determine whether grounds for termination exist. Some generality seems to be an inescapable hazard of any effort to define grounds for termination. "It is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees includes 'catch-all' clauses prohibiting employee 'misconduct', 'immorality', or 'conduct unbecoming.'" Arnette v. Kennedy, 416 U.S. 134, 161, 94 S.Ct. 1633, 1648, 40 L.Ed.2d 15 (1974), quoting with approval from Meehan v. Macy, 392 F.2d 822, 835 (D.C. Cir. 1968).

protection of the employment right to establish a property interest. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576-78, 92 S.Ct. 2701, 2708-10, 33 L.Ed.2d 548 (1972).

B. Constitutional Due Process

Recognizing that Mr. Suldan's interest in continued employment is sufficiently structured to constitute property and qualify for due process protection, we proceed to the next tier of inquiry. This requires a determination of what process is due under the Constitution. The procedures identified as an irreducible minimum under the Constitution must then be compared to those available under the Act to determine whether the Act's procedures meet the requirements of due process.[17]

The fundamental concept of procedural due process is that the government may not be permitted to strip citizens of "life, liberty or property" in an unfair, arbitrary manner. Where such important individual interests are exposed to possible governmental taking or deprivation, the Constitution requires that the government follow

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[17]The government suggests that if legislation establishing a property right also limits the protections of that right, the right may be abolished pursuant to the statutory provisions even if those provisions fall short of providing normal constitutional due process procedures. Govt. Brief at 10. This contention is rejected for two reasons. First, although the position had been articulated by Justice Rehnquist in a plurality opinion joined by two other justices in Arnette v. Kennedy, supra, a majority of the United States Supreme Court had never accepted that analysis as of the time of the Micronesian Constitutional Convention. See Tribe, American Constitutional Law, supra at 533-36. Beyond that, acceptance of the government's position would obliterate constitutional protection against arbitrary abolition of important rights established by statute. Legislatures are free to decide not to establish important property interests but once those interests are established, the Constitution protects against their unfair or arbitrary termination or manipulation by government administrators.

procedures calculated to assure a fair and rational decision making process.

1. The procedures followed. The procedures followed in Mr. Suldan's case up through the ad hoc committee proceeding indisputably meet these requirements. He was apprised of the charges against him and given an opportunity to respond. Before his termination he received letters from his supervisor outlining the charges and seeking his response. After the termination a full evidentiary hearing was provided before the ad hoc committee. Mr. Suldan was represented by counsel throughout the two day hearing and a record of the proceedings was maintained. A written opinion was provided by the ad hoc Committee. These procedures are all specified in the Act. 52 FSM Code §§ 151-156.

Up to that point there is no objection to the procedures followed. Under the National Public Service System Act however, the written statement of the ad hoc committee is not a final decision but merely has the status of a "recommendation." The Act calls for another step:

> [The Committee] shall forthwith transmit that statement, with such supporting documentation as it deems appropriate, to the highest management official responsible for the agency in which the appellant is or was employed. The decision of that management official shall be final.

52 FSM Code § 156.

It is these two sentences against which Mr. Suldan mounts his constitutional attack. He argues that these sentences permit decisions without reference to the hearing record and effectively undo the procedural protections established in the other provisions.

In this case, the entire record compiled by the ad hoc committee, including the transcript of proceedings, actually was transmitted to

President Nakayama and he made a "complete and careful review" of the record. These recitations in the file are uncontested but Mr. Suldan asserts that the statute is unconstitutional because it does not require the highest management official to review the record and base his decision upon it.

In considering this claim, it is helpful to note that President Nakayama's departure from the committee's recommendation was on a question of law. President Nakayama agreed with the ad hoc committee that Mr. Suldan's actions and omissions on the days in question constituted grounds for termination. He also recognized that the government had granted sick leave and annual leave to Mr. Suldan for his absences on those dates.

The President however did not agree as to the legal effect of these facts. Specifically, he did not consider the granting of sick leave or annual leave on days when an employee failed without good reason to appear for work, to serve as a bar preventing the government from disciplining the employee for his failure to appear.

The Act limits the scope of review to be undertaken by the Court of disciplinary actions.[18] We are not to review factual findings such as those by the Committee and the President that Mr. Suldan failed to appear on the days in question and that the government nevertheless awarded him sick leave and annual leave for those days.

We may however review the decisions of those administrative

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[18]"Disciplinary actions...shall in no case be subject to review in the Courts...except on the grounds of violation of law or regulation or of denial of due process or of equal protection of the laws." 52 FSM Code § 157.

officials as to the legal effect of those facts. Here, I have reviewed President Nakayama's legal conclusion that the granting of sick leave and annual leave did not constitute a waiver of the government's right to discipline Mr. Suldan for his absences on those days.[19] I concur with and uphold that legal decision. The government's right to discipline an employee for unexcused absences is not erased by the fact that annual leave and sick leave are awarded for the days of absence.

2. The Act's procedural requirements. Leaving aside the question of bias of the decision maker the preceding analysis establishes that the procedures applied to Mr. Suldan met the requirements of due process. This does not entirely dispose of his claims in this case. An unconstitutional statute may not be redeemed by voluntary administrative action. Mr. Suldan asserts that the Act, the vehicle for the government's actions in this case, is unconstitutional and that the government's attempt to use the unconstitutional Act against him is invalid. We must therefore consider whether the last sentences of § 156 are to be interpreted as Mr. Suldan contends.

Although this opinion declares the obligation of this Court to provide judicial review of congressional action to assure compliance with the Constitution, the power of judicial review is not to be lightly invoked. Unnecessary constitutional adjudication is to be avoided. In re Otokichy, 1 FSM Intrm. 183, 190 (App. 1982). If construction of a statute by which a serious doubt of constitutionality may be avoided is

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[19] In light of Mr. Suldan's admission that his actions furnished sufficient grounds for termination, Defendant's Request for Admission No. 3 (Appendix A to Defendant's Brief on Summary Judgment), there is no occasion here for Court review of that question.

fairly possible, a court should adopt that construction. Suldan v. FSM, FSM Intrm. 201, 205 (Pon. 1982); Truk v. Hartman, 1 FSM Intrm. 174, 180-81 (Truk 1982); Tosie v. Tosie, 1 FSM Intrm. 149, 157 (Kos. 1982). These principles mandate that we begin analysis of the Act with a sympathetic effort to understand what Congress was trying to accomplish in enacting this language and a presumption that Congress was attempting to enact a statute which would meet the basic requirements of procedural due process.[20] No legislative history explaining the intended meaning of the Act's disciplinary provisions has been located so we must emphasize the Act's procedural provisions to discern the pattern.

Most of the disciplinary action provisions relate to the appointment and duties of the ad hoc committee, and the hearing over which they are to preside.[21] At the conclusion of the hearing, the committee is commanded to prepare a "full written statement of its findings of fact and its recommendations for action." 52 FSM Code § 156.

Section 156 does not affirmatively state that the final decision of

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[20]The United States Supreme Court in considering procedural due process claims under that Constitution has said: "Due respect for the coordinate branches of government, as well as a reluctance when conscious of fallibility to speak with our utmost finality [citations omitted] counsel against unnecessary constitutional adjudication. . . . In particular, this Court has been willing to assume a congressional solicitude for fair procedure, absent explicit statutory language to the contrary." Califano v. Yamasaki, 442 U.S. 682, 99 S.Ct. 2545, 2553, 61 L.Ed.2d 176 (1979).

[21]"At the hearing, the appellant and the responsible management official shall each have the right to be heard, to present evidence, to be confronted by all adverse witnesses, and to be represented by counsel of his own choosing....[E]vidence shall be taken stenographically or by recording machine. The committee shall...subpoena witnesses and tangible evidence, when such witnesses or evidence are relevant and material.... Hearings shall be public except when the appellant requests a closed hearing." 52 FSM Code Section 155.

the highest management official must be based on the evidence presented at the hearing. The Act merely says that the committee shall transmit its statement, "with such supporting documentation as it deems appropriate," to the highest management official. Although the highest management official must make the final decision, Congress did not spell out the requisite depth of that official's involvement in the process.

This combination of detailed and elaborate procedures for the ad hoc committee and no explicit guidance for the management official suggests primary congressional reliance on the committee with an expectation that the highest management official's role would normally be peripheral. The provision for a final decision by the official apparently is in the nature of a safeguard, against decisions either patently unfair to an employee or seriously at odds with agency or branch policy. The plain implication of the statutory scheme is that Congress expects that the highest management official would normally accept the committee's recommendation without extended consideration. Nothing in the Act suggests that in providing this flexibility and opportunity for supervisory participation by the highest management official, Congress intended to undercut the procedural safeguards erected in the Act's preceding sections.

I conclude that although the last sentences of § 156 provide a range of possible options for the highest management official, he may not exercise those options in a way which undoes the very purpose of the hearing provisions. Whichever path is selected, the official remains subject to the Act's overriding requirements of procedural fairness. His action must be consistent with the Act's overall procedural scheme.

The crucial requirement then is that the final decision be based upon the information presented at the hearing and no other information. The hearing is the heart of the statutory scheme. To permit a final decision without considering the information provided at the hearing or based on other information would render the hearing, as well as the § 155 rights to counsel, to be heard and to confront adverse witnesses, meaningless. A few examples may illustrate the possible roles available to the highest management official and the consequently varying responsibilities.

a. Acceptance of the committee's recommendation. The apparent Congressional assumption was that the highest management official would normally find the ad hoc committee's recommendation reasonably fair to the employee and substantially in accord with the policy and needs of the branch or agency. Congress apparently expected that the official would normally issue formal approval of the ad hoc committee's recommendation without full review of the record. That final decision would merely give legal force to a decision reached in compliance with statutory and due process requirements. The official's decision would meet the statutory requirements.

b. Rejection of the decision. The more difficult questions will arise where the highest management official is not content with the decision of the ad hoc committee. There the due process and implied statutory requirements could vary, depending on whether the disagreement is on issues of fact, law, or mixed questions of fact and law.

If the highest management official declines to accept a finding of fact of the ad hoc committee, the official will be required by statutory as well as constitutional requirements to review those portions of the

record bearing on the factual issues and to submit a reasoned statement demonstrating why the ad hoc committee's factual conclusion should be rejected.

In this case, President Nakayama accepted the ad hoc committee's factual findings that Mr. Suldan had received sick leave and annual leave credit on the dates of absences complained of. He differed with the committee only as to the legal effect of those facts. Some legal issues may be entirely "clean," unaffected by any factual dispute. In any event, President Nakayama reviewed the entire record. His actions could not be said to have detracted from the purpose of the § 155 hearing procedures.

Summarizing then, I conclude that the Act's disciplinary sections allow the highest management official to finalize the decision of the ad hoc committee without review of the hearing record, if he accepts their findings of fact and law, or merely overrules a legal decision unaffected by any difference in the facts. To overrule the committee's factual findings or rulings on mixed issues of fact and law, the official is required to review all pertinent parts of the hearing record and to explain his analysis in his final decision.

Thus read, the provisions in the last two sentences of § 156 contemplating final decisions by the highest management official without demanding full review of the record flow logically from, rather than undercut, the extensive hearing procedures carefully set forth in §§ 151 to 156.

C. Impartiality

Suldan also argues that § 156 is constitutionally defective because it fails to specify that the hearing officer must be impartial. As

already indicated, Courts should not lightly assume improper motivation of the Congress. Without express language so indicating, I perceive no basis for believing that the same Congress which painstakingly set forth fair hearing procedures in the Act also intended to authorize final decisions by biased decision makers.[22] I conclude therefore that the Act, by implication, requires decisions by unbiased persons.

Mr. Suldan also generically attacks the regulatory identification of the § 155 "highest management official" as the head of the governmental branch in which the appellant is employed. FSM Pub. Ser. Reg. 18.14. Mr. Suldan points out that heads of branches will typically be supervisors of the executive official whose decision will be at stake in the appeals. He contends these persons invariably will be tempted to side with their official.

Unquestionably, due process demands impartiality on the part of adjudicators. Ward v. City of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972). This requirement of impartiality surely applies to the "highest management official" acting under § 156. Analysis begins however with the presumption that the judicial or quasi-judicial official is unbiased. Schweiker v. McClure, 456 U.S.188, 102 S.Ct. 1665, 72 L.Ed.2d 1 (1982). The burden is placed on the party asserting unconstitutionality. The presumption of neutrality can be rebutted by a

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[22]See Arnette v. Kennedy, 416 U.S. 134, 199, 94 S.Ct. 1633, 1666 40, L.Ed.2d 15 (1974) [White, J. concurring: "We need not hold that the Act is unconstitutional for its lack of provision for an impartial hearing examiner. Congress is silent on the matter. We would rather assume, because of the constitutional problems in not so providing, that if faced with the question (at least on the facts of this case) Congress would have so provided.]

showing of conflict of interest or some other specific reason for disqualification. Where disqualification occurs, it is usually because the adjudicator has a pecuniary interest in the outcome or has been the target of personal abuse or criticism from the party before him. Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975). These common grounds for disqualification do not exist here. I find unpersuasive Mr. Suldan's generalized conclusions derived from forces assertedly influencing branch heads. True, the highest management official sometimes could be tempted to support decisions of subordinate officials, regardless of the merits. Yet, the highest official's incentive to assure fairness and rationality of actions within the branch is surely of equal strength. The highest official's strongest motivations would seem to be to assure that effective employees are retained within the branch and are not mistreated. I conclude that generally the highest management officials will have powerful incentives to assure fair personnel actions. These officials cannot be said to be biased as a class and they cannot be disqualified by virtue of their positions, without individual consideration.

The only evidence pointed to by Mr. Suldan as showing actual bias was a letter, dated January 7, 1983, from President Nakayama to Quirino Mendiola, head of the ad hoc committee. Explaining that he had decided to disapprove the committee's recommendation, President Nakayama said:

> The management as you know is the legal arm of my office which advises me on legal matters including the Suldan case. Since there is a conflict of interest on the part of management in advising me on this particular case, I have decided to disapprove your recommendation (not on the merit but) so that the case may be appealed to the FSM Court.

While this statement acknowledges a "conflict of interest" on the part of the President's legal advisors, there is no indication that the President himself was biased. To the contrary, the letter demonstrates laudable solicitude and concern for fair play and the rights of Mr. Suldan. The letter does not constitute an adequate basis for disqualification on grounds of bias.

I conclude that the Act prohibits biased decision makers and that President Nakayama was not biased against Mr. Suldan.

Conclusion

The disciplinary action provisions of the National Public Service System Act provide procedural protections sufficient to meet constitutional due process requirements. Having found that Mr. Suldan was afforded procedures meeting the requirements of due process and of the Act, the Court denies this appeal from the order terminating his government employment.

The clerk is instructed to enter an order of dismissal and final judgment in this case.

So ordered as of the 28th day of October 1983.

Edward C. King
Chief Justice
Supreme Court of the Federated States of Micronesia

Entered this _____ day of October 1983.

Chief Clerk of Court